FILED
JUL 9 - 2007
OFFICE OF THE CLERK

No. (1) 07-55

# In The Supreme Court of the United States

**TIMOTHY C. AREY,**

***Petitioner,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

TO WHAT EXTENT MAY COURTS VARY A SENTENCE UPWARD ABOVE A CALCULATED GUIDELINE RANGE BY FINDING FACTS NOT DETERMINED BY A JURY?

No. ___-_____

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SUPREME COURT OF THE UNITED STATES

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## PETITION FOR A WRIT OF CERTIORARI

Timothy Clay Arey ("**Petitioner**"), by counsel, petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for "**the Fourth Circuit**" in this case.

## OPINIONS AND ORDERS BELOW

The June 1, 2006, Judgment of the U.S. District Court for the Western District of Virginia ("**WDVA**") is Appendix A. The March 8, 2007 unpublished opinion of the Fourth Circuit, U.S. v. Arey, 2007 U.S. App. LEXIS 5501 (4th Cir. 2007), is Appendix B. The Order on April 4, 2007 with an effective mandate of April 12, 2007, denying the Petition for Rehearing, is Appendix C.

## JURISDICTION

The Fourth Circuit judgment was entered on April 12, 2007. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

**Sixth Amendment to the Constitution of the United States in pertinent part reads:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;...

## STATEMENT OF THE CASE

The jury in the WDVA found that Petitioner conspired and possessed at least 500 grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and five more firearms possession crimes as further described in the "Underlying Facts". He was sentenced to a **952 months total term in prison** for all convictions imposed as follows: **WDVA File No. 5:05CR00029**: Count 1: 292 months; Count 2: 240 months; Counts 4, 7 and 8: 120 months all to run concurrent with each other and Count 5 but consecutive to the other counts; and Count 5: 60 months. No sentence was imposed for Count 3. **WDVA File No. 5:05CR00062**: Counts 1 and 6: 300 months to run consecutive to all other sentences. The Fourth Circuit affirmed. The facts relied upon in this Petition were previously considered by the Fourth Circuit. U.S. v. Arey, 2007 U.S. App. LEXIS 5501 (4th Cir. 2007).

### 1. The underlying facts.

On November 17, 2005, a federal grand jury returned a multi-count Superseding Indictment against brothers Timothy ("Petitioner") and Randolph Arey in WDVA File No. 5:05CR00029. Relevant to this Petition, the Indictment charged and the Petitioner was ultimately convicted for conspiring, between 1999 and August, 2005, to distribute and the actual possession of methamphetamine with intent to

distribute, in violation of 21 U.S.C. §§ 841 and 846 (Counts 1 and 2), three counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) ("**§ 924 (c)**") (Counts 3, 5 and 6), possession of a firearm silencer in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871 (Count 7) and two counts of firearm possession following a conviction for a misdemeanor crime of domestic violence, in violation of 18 U.S. C. § 922 (g) (9) (Counts 4 and 8). The unpublished opinion of the Fourth Circuit did not explain the rationale for the sentences in WDVA File No. 5:05CR00062.[1] The Petitioner pleaded not guilty to all counts of the indictment in WDVA File No. 5:05CR00029 and was tried by jury in Harrisonburg, Virginia. The alleged conspiracy occurred in Augusta

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[1] It is unclear, because there is no indictment, argument, deliberation, jury verdict form or pre-sentence report in the record, why an additional 300 months of incarceration was justified in WDVA File No. 5:05CR00062 for another violation of 18 USC § 924 (C) (3) and whether these additional counts arose from the same series of transactions as the six (6) counts for which the Petitioner was sentenced in WDVA File No. 5:05CR00029. Also, the Fourth Circuit mistakenly did not mention or consider Counts Four, Seven and Eight as to WDVA File No. 5:05CR00029 and Counts One and Six as to WDVA File No. 5:05CR00062 in its unpublished opinion. U.S. v. Arey, 2007 U.S. App. LEXIS 5501 (4th Cir. 2007).

County, Virginia. The Petitioner, now age 49, has remained continuously incarcerated since August 10, 2005.

**2. District court proceedings.**

Several witnesses testified to Petitioner's drug trafficking activities.[2] Law enforcement officials executed a search warrant, on October 7, 2004, at Petitioner's Augusta County, Virginia home. The agents found him with a loaded pistol in his back pocket, a fanny pack containing methamphetamine and over $400 in cash. In the house, the agents found $7,000 in cash, digital scales, more methamphetamine, twenty-three firearms (including a silencer), ammunition and a RF detector, a device that can determine whether a person is wearing a wire transmitter.

Suppliers, drug dealers and spouses testified that the Arey brothers' "fronted" large quantities (pounds) of methamphetamine to them from 1996 or 1997 until 2001. They continued to buy methamphetamine from others after Wayne Roadcap, the main supplier, was arrested in 2001. Roadcap kept records showing the amounts of methamphetamine distributed to each brother, the debts they owed and when the debts were repaid. They individually came to Roadcap's house to pick up drugs.

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[2] The evidence presented at trial is summarized here in the light most favorable to the Government.

Government cooperators bought methamphetamine from one or both of the Arey brothers, by cash or property swap, and sold methamphetamine for them. One witness saw Petitioner with a revolver, which he claimed was kept nearby in case the police showed up.

Randolph obtained methamphetamine from Petitioner and Roadcap. Petitioner sold drugs to several people and, once, mounted a device holding a handgun under the kitchen table aimed at the front door in case a drug deal went wrong. After arrest, Petitioner admitted selling methamphetamine and that several persons sold drugs for him.

Petitioner claimed, in his trial testimony, that he only sold small amounts of methamphetamine to support his personal habit. He denied being part of a conspiracy and selling large quantities (pounds) of methamphetamine over a six-year period. He admitted to collecting or carrying firearms, but denied using them as part of his drug trade.

The jury convicted Petitioner on all counts and he was sentenced on June 1, 2006. The court, over Petitioner's objection, found he was responsible for handling nine kilograms of methamphetamine over a six-year period.[3] Based on this, Petitioner's base offense level was enhanced

[3] The jury had found by in a general verdict form that the Count One conspiracy was responsible for at least 500 grams of methamphetamine.

from 32 to 36. The court also found that Petitioner perjured himself at trial and thus obstructed justice. Consequently, his base offense level was increased two levels to a total of 38. After calculating this guideline and supposedly considering the 18 U.S.C. § 3553(a) factors, the court imposed a total of 952 months in prison for the Petitioner.

Petitioner's prior convictions amounted to a Criminal History Category of III. The court adopted the presentence report and incarcerated him for 79 years and 4 months (952 months). Because he was age 48 when sentenced, this amounted to a sentence of greater than life in prison with the Petitioner theoretically eligible for release near age 128.[4] No reason was found to depart from this mandated sentence.

**3. Fourth Circuit U.S. Court of Appeals proceedings.**

Petitioner sought relief from his convictions and sentences for drug trafficking, conspiracy and firearms violations. Among other contentions, Petitioner asserted that the trial court violated his Sixth Amendment rights by increasing his sentence based on facts not found by the jury and because the Court did not properly consider the 18 U.S.C § 3553(a) factors.

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[4] Hypothetically, an age 18 defendant receiving the same sentence would be released from prison near age 98 if he lived that long.

Petitioner argued that the quantity of drugs attributable to him by the Judge at sentencing could be no more than what the jury found (more than 500 grams) and that the verdict form did not include a jury finding as to the total amount of cocaine base attributable to him. He also challenged the court's other fact findings without a jury and the stacking of huge sentences for the firearms convictions relied upon to increase his punishment.

The Fourth Circuit affirmed Petitioner's convictions and sentence because drug quantity, obstruction of justice and perjury were all supported by the evidence. No consideration was given to the propriety of consecutive sentences for so many firearm possession offenses arising out of one underlying conspiracy. Also, no consideration or explanation was given to justify an additional 300 months of consecutive incarceration in WDVA File No. 5:05CR00062. Petition for rehearing en banc was denied on April 12, 2007.

## REASONS FOR GRANTING THE PETITION

### THE WDVA TRIAL COURT AND THE FOURTH CIRCUIT COURT OF APPEALS DID NOT FOLLOW THIS COURT'S RULING IN UNITED STATES V. BOOKER AND UNITED STATES V. RITA

Petitioner's sentencing depends on the Court's proper application of U.S. v. Booker, 543 U.S. 220, 125 S. Ct. 738,

160 L. Ed. 2d 621 (2005) ("**Booker**").[5] Disparate treatment of drug weights for different contraband substances is scheduled for upcoming consideration in this Court[6] as is the standards for and propriety of departures.[7]

The reasonableness presumption for Federal sentences after Booker was recently ruled upon in Rita v. U.S., 2007 U.S. LEXIS 8269 (2007) ("**Rita**"). Rita requires

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[5] This Court last term also held that California's determinate sentencing law, "by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) ("**Cunningham**").

[6] The Fourth Circuit's decision in U.S. v. Eura, 440 F.3d 625, 634 (4th Cir. 2006) (vacating a variance sentence based on the sentencing court's rejection of the 100:1 crack/powder cocaine sentencing ratio) will be scrutinized in Kimbrough v. U.S., 2007 U.S. LEXIS 7524 (2007) granting certiorari from the Fourth Circuit to consider this issue. Compare, U.S. v. Kimbrough, 174 Fed. Appx. 798, 2006 U.S. App. LEXIS 11524 (4th Cir. 2006). (unpublished) (The district court erred when it concluded that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range).

[7] This Court recognized that "[a] number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance...[Citations Omitted] We will consider that approach next Term in U.S. v. Gall, No. 06-7949. Rita v. U.S., 2007 U.S. LEXIS 8269 (2007).

that the sentencing judge should articulate enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for the sentence imposed. There, the judge's statement of reasons was brief but legally sufficient after consideration of arguments for a downward departure before finding those circumstances insufficient to warrant a sentence lower than the Guidelines. Where a sentencing judge considers evidence and arguments in a conceptually simple case, there is no requirement to write more extensively.[8] The Fourth Circuit, after applying the presumption, correctly held that Rita's sentence was not "unreasonable."[9] Rita's special circumstances -- his health, fear of retaliation, and military record were not special enough, in light of § 3553(a), to require a lower sentence. Whether sentences are reasonable under § 3553(a) when expressly declining to consider various personal characteristics, such as physical condition, employment record, and military service, was not considered by this

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[8] This case involving sentences for 8 separate convictions arising out of a conspiracy alleged to have existed for several years is not "conceptually simple".

[9] Petitioner urges this Court to find that, with rare if any exceptions, an absurd sentence of this length (952 months) is never entitled to a presumption of reasonableness in drug conspiracy cases that do not involve actual violence, death or serious bodily injury.

Court although, days later, the President of the United States articulated a contrary and hypocritical position in a famous but similar situation where a term of imprisonment imposed for lying under oath was commuted by him.[10]

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[10] "Defense lawyers and experts on federal sentencing guidelines said the president's actions are at odds with the administration's position on those guidelines. The Bush Justice Department has opposed attempts to impose sentences more lenient than what the guidelines call for, even in cases involving white-collar criminals with no criminal history, such as Libby.

"On the one hand, you have the administration taking the position in every federal sentencing that a guidelines sentence should be imposed," said Barry Boss, a Washington defense lawyer and former co-chairman of the U.S. Sentencing Commission's Practitioners Advisory Group. "And then you have President Bush saying in his statement that the guidelines are too harsh."

The president has the authority to commute any sentence at any time. However, the Justice Department has its own procedures for recommending commutations to a president. Under those rules, Libby would not have been eligible until he had started to serve his prison term and ended his appeals. Jeffress said yesterday that defense attorneys had not asked Justice or Bush to commute Libby's sentence.

Several legal observers noted that the administration had opposed a plaintiff in a recent Supreme Court case who sought a lighter penalty than the 33 months in prison to which he was sentenced after convictions for perjury and obstruction of justice.

In Rita v. U.S., Victor A. Rita argued for leniency on the grounds that he was a 24-year veteran of the Marine Corps, with tours of duty in Vietnam and the Persian Gulf

In less than one month after this most recent decision in Rita,[11] this case presents to this Court the exact problem that Justice Scalia warned about in his concurring opinion:

> The Court's decision today leaves unexplained why the mandatory Guidelines were unconstitutional, but the Court-created substantive-review system that

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War, a longtime employee of the immigration service and in poor health. The government contended that the district judge considered those factors and had imposed the sentence in a reasonable way.

The Supreme Court ruled on June 21 that sentences that fall within the federal guidelines may be presumed "reasonable" by appeals courts reviewing them. That was the position advocated by the solicitor general."
The Washington Post, Bush Says He's Not Ruling Out Pardon for Libby, 7-4-2007, Page A-4.

[11] Although this Court wants legal issues to undergo lengthy fermentation in lower courts before granting a Petition for Writ of Certiorari, additional delay will only confuse trial judges in these commonly reoccurring cases if this issue remains unanswered and, from the Petitioner's perspective, his life will effectively be over if his 952 months of incarceration for crimes not involving violence or serious physical injury to others is left to stand as "reasonable". As noted in Rita, this issue has already confused the Courts everywhere after Booker. "[A]fter watching this Court -- and the other Courts of Appeals, whether they have formally adopted such a presumption or not -- affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real." U. S. v. Pruitt, No. 06-3152, 2007 U.S. App. LEXIS 12872, *35-*36 (CA10, June 4, 2007) (McConnell, J., concurring). Rita v. U. S., 2007 U.S. LEXIS 8269 (2007).

> contains the same potential for Sixth Amendment violation is not. It is irresponsible to leave this patent inconsistency hanging in the air, threatening in the future yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust. Rita v. U.S., 2007 U.S. LEXIS 8269, 80-81 (2007).

The sentence imposed for the conspiracy and drug possession counts exceeded the maximum allowed for the drug charges alone by 104 months based on facts not found by the jury. This case presents the problem Justice Scalia recognized in his Rita concurring opinion: To what extent may courts vary a sentence upward by finding facts not determined by a jury? This is:

> "[t]he common case in which the district court imposes a sentence within an advisory Guidelines range that has been substantially enhanced by certain judge-found facts. For example, the base offense level for robbery under the Guidelines is 20... which, if the defendant has a criminal history of I, corresponds to an advisory range of 33-41 months... If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $ 5 million was stolen, then the base level jumps by 18...producing an advisory range of 235-293 months... When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the

> 293-month sentence unlawful. That is evident because, were the district judge explicitly to find none of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive." Rita v. U.S., 2007 U.S. LEXIS 8269, 60-61 (2007).

Likewise, Justices Stevens and Ginsburg, in their concurring opinion, anticipated the quick arrival of this case to resolve this issue: "Such a hypothetical case should be decided if and when it arises [citation omitted]." Rita v. U.S., 2007 U.S. LEXIS 8269 (2007).

Accordingly, Jones, Apprendi, Ring, Blakely and Booker[12] ("the Apprendi line of cases") require that the characterization of a fact under the Constitution depends on its function. "When the term sentence enhancement is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Apprendi, 530 U.S. at 494 n.19. In

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[12] Jones v. U.S., 526 U.S. 227; 119 S. Ct. 1215; 143 L. Ed. 2d 311 (1999) (**"Jones"**); Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) (**"Apprendi"**); Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (**"Ring"**); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (**"Blakely"**); U.S. v. Booker, Supra.

other words, the Sixth Amendment requires that facts in a conspiracy that could increase a Base Offense Level of punishment under the Guidelines must be alleged in an indictment and proven beyond a reasonable doubt to a jury.

In addition, in contrast to Rita, the judge in this case made insufficient findings that the sentence imposed would satisfy all the statutory objectives and never considered all the factors set out in 18 U.S.C. § 3553(a).[13] Not applying these factors, which are required under the Booker remedial scheme, and imposing 952 months for one series of related events means that this mandatory imposition of sentence, without considering the statutory factors, substantially impacted the adverse outcome of Petitioner's sentencing. Unmistakably, this was not a case where "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See Rules 32(f), (h), (i)(1)(C) and (i)(1)(D)."Rita v. U.S., 2007 U.S. LEXIS 8269 (2007).

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[13] The joint sentencing hearing for both Arey brothers was completed in 45 minutes that, if half that time was used to consider the Petitioner's case, resulted in approximately 42 months of incarceration imposed per minute. The length of sentence per minute imposed upon the Petitioner exceeds the maximum Guideline sentence that was at the center of the controversy in Rita.

Unlike the sparingly prosecuted offense in Rita, Petitioner and thousands of people in every federal court facing drug conspiracy sentencing are exposed to an exceptionally large punishment range specified by Congress: **10 years mandatory minimum incarceration to life in prison**.[14] See 21 USC § 841. Despite Booker and Rita, this issue has not reached this Court before although most federal sentences involve fact findings for drug conspirators.

The Petitioner's sentence violated Blakely which was applied to the Guidelines in Booker. Blakely mandated that "'[o]ther than the fact of a conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 124 S. Ct. at 2536, *citing* Apprendi, 530 U.S. at 490 (2000). The term "'statutory maximum' for Apprendi purposes, is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 124 S. Ct. at 2537 (emphasis in the original), *citing* Ring, 536 U.S. at 602 (2002) ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone"); *see also* Harris v. U.S., 536 U.S. 545, 563 (2002). Put

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[14] Rita considered the reasonableness of a sentence within a guideline range between 33 and 41 months and where the statutory maximum punishment was **"not more than five years"** in prison. 18 USC § 1623.

another way in Justice Scalia's opinion, "the maximum [the judge] may impose *without* any additional findings," absolutely limits the sentence, which may only be predicated upon the jury's finding of "all the facts 'which the law makes essential to the punishment.'" 124 S. Ct. at 2537. The Blakely and Apprendi rationale were further reinforced in this Court's opinion in Booker.

The 500 gram threshold amount on the jury verdict form in this case, when compared to the amount of methamphetamine (9 kilograms) and the other facts judicially attributed to Petitioner at sentencing clearly establishes the prejudice stemming from this confusion. Requiring that these additional facts be proven to a jury protects the accused against the practice of jury determination of whether the drug weight proven beyond a reasonable doubt falls above a low threshold quantity at or near the bottom of the statutory scheme, only to determine sentence on the basis of huge drug amounts not found by the jury. This arbitrariness is alone enough to remand for resentencing. The fact that Petitioner has received a functional life sentence, in part due to the extra drug quantities attributed to him, further reinforces the need for resentencing, considering that a life mandatory sentence is reserved under the statute (21 U.S.C. § 841) for defendants with two prior felony drug convictions or violent activities

The district court failed to consider any factors described in 18 USC § 3553(a) which Booker made clear now must be considered. Id. at 764-65. Petitioner therefore was denied due process. Id. at 750 (Mandatory imposition of the Guidelines violated the Sixth Amendment).

The Fourth Circuit ignored its own precedent that required remand from a Booker violation. U.S. v. Hughes, 401 F.3d 540 (4th Cir. 2005) (applying Booker to all cases on direct review and requiring remand). Only remand will correct the Sixth Amendment fact finding violation at sentencing and implement the remedial scheme in Booker.

Petitioner's Sixth Amendment right to trial by jury was violated by the finding of facts neither determined by the jury nor admitted by him. Specifically, the jury found him guilty of conspiring to distribute or possessing with intent to distribute more than 500 grams of methamphetamine, which corresponded to offense level 32 under U.S.S.G. § 2D1.1 of the Guidelines. The jury did not find any other facts to increase Petitioner's sentence. The drug quantity found, as well as findings that he obstructed justice, brought the offense level to 38. The "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In Booker, as objected to here, the sentencing court impermissibly increased the more lenient Guideline sentence by finding facts not alleged in the indictment, proved beyond a reasonable doubt or admitted by the Defendant. Here, the minimum sentence at level 38 (292 months) exceeded the maximum possible sentence at level 32 (188 months) by 104 months. Additionally, there is no record as to whether the punishment in WDVA File No. 5:05CR00062 and WDVA File No. 5:05CR00029 an additional § 924 (C) and other firearms violations, that justified an additional 660 months of consecutive incarceration, were appropriate under Booker and the Sixth Amendment.

Consequently, how the sentencing guidelines apply to Petitioner is directly within the protections afforded by the Apprendi line of cases. See Ring, supra, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); Harris v. U.S., 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is the maximum that the Judge may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does

not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. Blakely, 124 S. Ct. at 2537.

Sentencing judges sitting within the Fourth Circuit vary downward from a Guidelines sentence at their peril but are subject to no limitations when, as here, imposing upward departures based on judge and not jury found facts. A Guidelines sentence is presumed reasonable. U.S. v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006). A variance sentence, by contrast, is reviewed for both substantive and procedural error. Id. at 434. "[T]he farther the Court diverges from the advisory Guideline range, the more compelling the reasons for the divergence must be." Id. Moreover, the district court's reason for imposing a variance sentence may not contravene the policies stated in the "advisory" Guidelines. See, e.g., U.S. v. Hampton, 441 F.3d 284 (4th Cir. 2006) (vacating a downward variance sentence imposed out of concern for defendant's small children, noting that family ties are a discouraged factor under USSG § 5H1.6).

Applying the Sixth Amendment to current sentencing law is complicated. This Court has not yet adequately marked the line between judge and jury in determining facts and, in particular, the extent of permitted factfinding by a judge when sentencing after jury's verdict of guilty.

Jones called attention to the serious threat to the practical value of the jury trial right. Jones committed a basic crime subject to this right, but received enhanced punishment based on facts found by the judge alone. Thus, he was convicted solely of carjacking, but if the further fact of causing "'serious bodily injury'" was shown, the maximum penalty jumped from 15 years to 25. Id., at 230, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (quoting 18 U.S.C. § 2119). The Government argued that this extra fact required no jury finding because it was only a condition for imposing an increased sentence, up to a judge, not an element of a more serious crime, subject to the right to a jury trial. See Jones, 526 U.S., at 233, 119 S. Ct. 1215, 143 L. Ed. 2d 311.

In common drug conspiracy and related firearms prosecutions, the most serious issue is not guilt or innocence of the basic offenses, but liability to the substantially enhanced penalties. Nevertheless, in the numerous similar cases everywhere since Booker, judges almost always have exclusive power to find the facts necessary to sentence in the higher range would make the jury a mere gatekeeper to the more important trial before a judge alone. Id., at 243-244, 119 S. Ct. 1215, 143 L. Ed. 2d 311. Judicial factfinding necessary for a higher sentence over a defendant's objection is not permitted under the Sixth Amendment because, otherwise, a defendant's right to have a jury is compromised.

Jones accordingly treated this practice as suspect enough to call for applying the doctrine of constitutional avoidance when the Court interpreted the statute in question.

This constitutional issue did not end with Jones, and soon arose again in Apprendi. There, exposing a defendant to an increased penalty beyond the range for a basic crime, based on facts determined by a judge, violated the Sixth Amendment and, in the absence of a jury waiver; a defendant could not be subjected to a penalty more serious than authorized by the facts found by the jury or admitted by the defendant. Id. at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435. n1 A fact that raised the range of possible penalties functioned like an element of a more serious offense, even if a statute tied that fact to the sentence alone. Hence, in the absence of waiver, a sentence in that higher range could be imposed only if the enhancing fact was found beyond a reasonable doubt by the trial jury. In deciding this, the Court made a practical judgment that respected the historical judicial role in finding facts relevant to sentencing within the range set by a jury's verdict, but recognizing that the jury right would be violated if that traditional practice could be extended to the point that a judge alone (over objection) could find a fact necessary to raise the upper limit of a sentencing range.[15]

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[15] This Court recognized a single exception to this rule, permitting reliance on the fact of a prior conviction without a

From the moment Apprendi drew that line, however, its holding impacted the Guidelines. A judge may depart from the assigned Guidelines subrange only if the case presents a circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b)(1). Therefore, a judge must find facts beyond those necessary for the jury's guilty verdict to sentence above the sub range designated for an offender with a similar criminal history whose case presents no relevant facts beyond the elements of the crime itself. The judge's factfinding could never increase the sentence beyond the range set by the law defining the crime because a principal motivation for Guidelines sentencing is eliminating judicial discretion by forbidding a judge to impose a high sentence that violates a defendant's right to a jury trial.

Blakely, considering a state system similar to the federal scheme, decided that Apprendi preserved the historical significance of the jury. See 542 U.S., at 305-306, 124 S. Ct. 2531, 159 L. Ed. 2d 403. The additional factfinding necessary for a judge to sentence within a high subrange was no different than an enhanced sentence under

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jury determination that the defendant had previously been convicted. See Apprendi, 530 U.S., at 489-490, 120 S. Ct. 2348, 147 L. Ed. 2d 435; see also Almendarez-Torres v. U.S., 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

the law considered in Apprendi. If Blakely had come out differently, Apprendi would be in jeopardy: legislatures would be free to bypass Apprendi by providing an abnormally large sentencing range for any basic crime (theoretically exposing a defendant to the highest sentence just by the jury's guilty verdict), then leaving it to a judge to make extra findings necessary for a sentence in a subrange at the high end. That negates Apprendi and diminishes the significance of jury rights that Apprendi protected. It is also precisely what Congress set up because Petitioner's statutory sentencing range is between 10 years and life in prison.

In Booker, a majority of the Court applied Blakely to hold that the Federal Guidelines, too, subjected defendants to unconstitutional sentences in upper subranges, absent a jury finding or waiver. However, the further issue of remedy and consistency faltered. For Guidelines to survive there were two serious alternatives. One was to require additional facts to be charged in the indictment and submitted to the jury. This requires that the Government would have to indict ahead and could not add relevant facts that emerged unexpectedly at trial. But the mandatory character of the Guidelines would survive, the goal of consistency would be served and the value of the jury right would not erode.

The second remedial alternative was to make the Guidelines discretionary so that finding extra facts were not

strictly necessary for sentencing in a high subrange under the Guidelines. A judge who found a subsidiary fact specified as a condition for a high subrange sentence could impose a low sentence (independently of the Guidelines' provisions for downward departure), and a judge who found no such fact could sentence within the high subrange for other reasons found sufficient. If the Guidelines were not mandatory, the subsidiary fact merely provided one reasoned basis for the exercise of discretion to sentence at the high end of the sentencing range provided by the statute defining the crime.

But that second alternative is not so simple: it raised yet further issues, and the majority of the Court that adopted it, see 543 U.S., at 244, 125 S. Ct. 738, 160 L. Ed. 2d 621, guaranteed that this case would eventually arise. If district judges treated the now-discretionary Guidelines simply as worthy of consideration but open to rejection in any given case, the Booker remedy would threaten a return to the old traditional sentencing regime that produced sentencing disparities that convinced Congress to adopt Guidelines in the first place. However, if the Guidelines result is persuasive or presumptively appropriate, the Booker remedy preserved the very feature of the Guidelines that threatened to trivialize the jury right. These upward departures based on judicial fact findings result in unreasonably harsh sentences, not justified by jury verdicts, as often as mandatory

Guidelines had previously. Allowing this to persist, as it does in all Federal Courts everywhere, negates Apprendi.

Without reason to risk sentencing reversal, the district judge found additional facts in disparagement of the jury right and sentenced for longer than was authorized by the jury's verdict alone. Petitioner's constitutional rights were violated by this procedure because the Sixth Amendment and the Apprendi line of cases will be nullified if this Court does not fix this problem.

Taking the Booker remedy (of discretionary Guidelines) as a given, however, the Sixth Amendment right to jury fact finding is violated because, unlike in Rita, above Guidelines sentences carry no presumption of reasonableness. Failure to review Petitioner's case will promote this unconstitutional application of the Guidelines by imposing appeal-proof sentences determined by judge found facts alone. The Government is not entitled to a presumption of reasonableness when an age 48 man absurdly receives almost 80 years in prison for convictions involving no actual violence or serious physical injuries to others. Ignoring this problem will eviscerate the goal of Congress to promote: "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct," as well as "proportionality in sentencing through a system that imposes appropriately

different sentences for criminal conduct of different severity." Rita v. U.S., 2007 U.S. LEXIS 8269 (2007).[16]

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[16] "Booker's standard of review allows -- indeed, requires -- district judges to consider all of the factors listed in § 3553(a) and to apply them to the individual defendants before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion principles. As the Court acknowledges, moreover, presumptively reasonable does not mean always reasonable; the presumption, of course, must be genuinely rebuttable. See ante, at 7. I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker. See post, at 7, n. 3 (SCALIA, J., concurring in part and concurring in judgment). One well-respected federal judge has even written that, "after watching this Court -- and the other Courts of Appeals, whether they have formally adopted such a presumption or not -- affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real." U.S. v. Pruitt, No. 06-3152, 2007 U.S. App. LEXIS 12872, 35-36 (10th Cir. 2007) (McConnell, J., concurring). Our decision today makes clear, however, that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal "presumption" of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-Booker interregnum will now recognize that the Guidelines are truly advisory." Rita v. U.S., 2007 U.S. LEXIS 8269, 50-52 (2007) (Stevens and Ginsburg concurring).

Finally, there is a division among the Circuits as to whether multiple convictions for firearms possession, carrying or use arising in a single conspiracy should be merged for purposes of sentencing or whether consecutive sentences are permitted. At least six of twelve circuits believe that the number of predicate offenses, not the number of guns, determine whether § 924 (c) convictions may be "stacked" for sentencing purposes.[17]

Within the Fourth Circuit, there are at least three conflicting authorities on this subject. Compare, U.S. v. Luskin, 926 F.2d 372 (4th Cir. 1991) (A separate underlying predicate crime is required for each enhancement under § 924(c)) with U.S. v. Camps, 32 F.2d 102 (4th Cir. 1994) (Defendant who used or carried firearm on several occasions during the course of a single continuing offense committed multiple § 924 (c) (1) offenses) and U. S. v. Dunford, 148 F.3d 385, 389-90 (4th Cir. 1998) (holding that defendant

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[17] U.S. v. Lindsay, 985 F.2d 666 (2d Cir. 1993); U.S. v. Privette, 947 F.2d 1259 (5th Cir. 1991); U.S. v. Henry, 878 F.2d 937 (6th Cir. 1988); U.S. v. Clark, 928 F.2d 733 (6th Cir. 1991); U.S. v. Taylor, 13 F.3d 986 (6th Cir. 1994); U.S. v. Smith, 924 F.2d 889 (9th Cir. 1991); U.S. v Franklin, 321 F.3d 1231 (9th Cir. 2003); U.S. v. Chalon, 812 F.2d 1302 (10th Cir. 1987); U.S. v. Wiseman, 297 F.3d 975 (10th Cir. 2002); U.S. v. Hamilton, 953 F.2d 1344 (11th Cir. 1991).

could only be convicted of single act of possession where multiple firearms were seized at single time and location).

This Court has sympathized with proportionality concerns but has not definitively decided how to resolve these issues. This Court acknowledged in dicta that criticisms of mandatory minimum sentences –including the criticism that "mandatory minimums … fail to account for the unique circumstances of offenders who warrant a lesser penalty – "may be sound…" Harris v. U.S., 536 U.S. 545, 568, 153 L.Ed.2d 524, 122 S. Ct. 2406 (2002) (citing an ***Amicus Curiae*** "Brief for Families Against Mandatory Minimums Foundation). Authority governing proportionality review remains an open question after Ewing v. California, 538 U.S. 11, 52, 155 L.Ed.2d 108, 123 S. Ct. 1179 (2003) (Breyer, J., dissenting). Seven of nine justices (excluding Justices Scalia and Thomas) agreed that proportionality review of a "3 strikes law" 25 years to life shoplifting sentence was proper, and one less than a majority joined in Justice Breyer's lengthy dissent, which concluded that the sentence – in spite of the defendant's prior criminal record – was "grossly disproportionate" and therefore unconstitutional.

Here, after 292 months was imposed for Petitioner's involvement in the drug conspiracy, that itself resulted from judicially determined facts not found by the jury, an

additional 660 months was added consecutively for the Petitioner's concurrent possession of numerous firearms.[18] The number of convictions arose during the course of this single conspiracy and resulted solely from prosecutorial discretion as to how many counts to include in the indictment. The Court's refusal to merge these related offenses for purposes of sentencing and to consider this issue raised by the Petitioner alone was a violation of 18 U.S.C. § 3553. Ironically, this post Booker confusion resulted in a completely contrary conclusion by a different Judge in the same year within the same District that this case first arose. U.S. v Barton, 442 F.Supp.2d 301 (WDVA 2006) (Addition of 210 months to defendant's sentence, which was properly imposed based on Guidelines ranges, was unnecessary to meet 18 USC § 3553(a)'s requirement that sentence reflect seriousness of crime committed because stacked mandatory minimum terms required, pursuant to § 924(c), would have exceeded defendant's lifespan anyway; thus, variance from Sentencing Guidelines was appropriate.).

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[18] With 23 firearms (including one silencer), consisting mostly of hunting rifles and shotguns having been seized during the search of the Petitioner's dwelling, 28.69 months per firearm forfeited was imposed as punishment. Put another way, Petitioner received an average of 110 months for each of his 6 separate firearms possession convictions.

## CONCLUSION

The petition for a writ of certiorari should be granted and this case should be remanded to the Fourth Circuit U.S. Court of Appeals with instructions to further remand this case to the U.S. District Court in the Western District of Virginia for reconsideration of Petitioner's sentencing in light of Booker and subsequent related authority.

Respectfully submitted,
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No. _____

# In The
# Supreme Court of the United States

**TIMOTHY C. AREY,**

***Petitioner,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## APPENDIX

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A – Judgment of the U.S. District Court for the Western District of Virginia ("**WDVA**")

Appendix B – Unpublished opinion of the Fourth Circuit, *U.S. v. Arey*, 2007 U.S. App. LEXIS 5501 (4th Cir. 2007) on March 8, 2007

Appendix C- Order on April 4, 2007 with effective Mandate of April 12, 2007 and Denying the Petition for Rehearing

**APPENDIX A TO PETITION FOR WRIT OF CERTIORARI**

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

**JUDGMENT IN A CRIMINAL CASE**

UNITED STATES OF AMERICA,

v.

TIMOTHY CLAY AREY
Case No: DVAW505CR000029-001
Case No: DVAW505CR000062-001
USM Number: 11098-084
Cheryl Higgins, Esq.
Defendant's Attorney

THE DEFENDANT:

Was found guilty on count(s) after a plea of not guilty, 1s,2s,4s,5s,6s,7s,8s of superseding indictment in 5:05CR00029 and count 1 in 5:05CR00062

The defendant is adjudicated guilty of these offenses:

21 USC § 846 Conspiracy to Distribute 500 Grams or More of Methamphetamine in Aug 2005 is in case 5:05CR00029

21 USC § 841 Possess Methamphetamine With the Intent to Distribute 10/7/04 2s in case 5:05CR00029

18 USC § 922(g)(9) Possess firearm After Crime of Domestic Violence on Oct. 7, 2004 4s and 8s in case 5:05CR00029

Count 3 and 3s are dismissed on the Motion of the United States.

Date of Imposition Judgment 6-1-06
Signed by
Samuel G. Wilson, United States District judge
6/8/06

**ADDITIONAL COUNTS OF CONVICTION**

18 USC 924 (c)(1) Possess Firearm in Furtherance of Drug Trafficking Summer 2004 5s in case 5:05CR00029

18 USC 924 (c)(1) Posses Firearm in Furtherance of Drug Trafficking in July 2004 6s in case 5:05CR00029

26 USC §§§ 5841, 5861 (d) and 5871 Posses a firearm Silencer August 10, 2005 7s in case 5:05CR00029

18 USC 924 (c) (1) Posses Firearm in Furtherance of drug Trafficking 10/7/04 1 in case 5:05CR00062

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States bureau of prisons to be imprisoned for a term of: 952 months (292 months as to count 1s, 240 months as to count 2s, 120 months as to counts 4s,7s,8s to run concurrent; 60 months as to count 5s to run consecutive; 300 months as to count 6 and count 1 in 5:05CR00062, to run consecutive)

The court makes the following recommendations to the Bureau of prisons:

If possible; the defendant shall be housed at Butner, NC.
The defendant is remanded to the Custody of the United States Marshall.

The Supervision release of the Judgment does not matter as client will exit the penitentiary in a coffin.

**APPENDIX B TO PETITION FOR WRIT OF CERTIORARI**

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus TIMOTHY CLAY AREY, Defendant - Appellant. UNITED STATES OF AMERICA, Plaintiff - Appellee, versus TIMOTHY CLAY AREY, Defendant - Appellant. UNITED STATES OF AMERICA, Plaintiff - Appellee, versus RANDOLPH WILLIAM AREY, Defendant - Appellant.

No. 06-4634; No. 06-4635; No. 06-4636

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2007 U.S. App. LEXIS 5501

February 19, 2007, Submitted
March 8, 2007, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeals from the United States District Court for the Western District of Virginia, at Harrisonburg. Samuel G. Wilson, District Judge. (5:05-cr-00029-sgw; 5:05-cr-00062-sgw).

DISPOSITION: AFFIRMED.

CASE SUMMARYPROCEDURAL POSTURE: Defendants sought review of a decision of the United States District Court for the Western District of Virginia, which convicted and sentenced them for a drug trafficking conspiracy under 21 U.S.C.S. § 846, and firearms violations under 18 U.S.C.S. § 924(c)(1).

OVERVIEW: Government agents testified that, upon execution of a search warrant, they found a pistol, methamphetamine, and cash on one defendant, and cash, digital scales, more methamphetamine, firearms, and ammunition in his home. Defendants' main methamphetamine supplier testified that he sold large quantities of the drug to defendants for several years. Other government witnesses testified that they purchased methamphetamine from defendants, who always carried firearms. On appeal, the court found that the evidence was sufficient to show a conspiracy to possess methamphetamine with intent to distribute, despite the absence of a formal agreement between defendants. The evidence was also sufficient to show that defendants possessed firearms in furtherance of a drug trafficking crime, particularly as several witnesses testified that defendants carried firearms when they were dealing drugs. The court also rejected defendants' claim regarding the conspiracy instruction, finding that it correctly outlined the elements and explained the controlling legal principles. In addition, the sentences did not violate the Sixth Amendment because the sentences were below the statutory maximum.

OUTCOME: The court affirmed the district court's decision.

CORE TERMS: methamphetamine, firearm, conspiracy, drug trafficking, sentence, distribute, furtherance, sufficient evidence, co-conspirators, sentencing, guidelines, legal principles, plain error, favorable, sentenced, bought,

conspiracy to possess, jury verdict, en banc, possessed, convicted, enhanced, prison, large quantities, carrying, selling, ex-wife, drug transactions, conspiracy charge, insufficient evidence

LexisNexis® Headnotes Hide

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
HN1 In evaluating whether a jury verdict is supported by sufficient evidence, an appellate court must sustain the verdict, if there is substantial evidence, taking the view most favorable to the government, to support it. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview
HN2 In a criminal case, an appellate court reviews for plain error an issue raised first on appeal and not properly preserved in the district court. More Like This Headnote

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review
HN3 An appellate court reviews a sentence to determine whether it is within the statutorily prescribed range and if it is reasonable. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > Elements
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements
Evidence > Relevance > Circumstantial & Direct Evidence
HN4 To secure a conviction on a charge of conspiracy to possess methamphetamine with intent to distribute, the government must first prove that an agreement existed

among the alleged coconspirators to possess and distribute methamphetamine. Because there is sometimes a lack of direct evidence of an agreement among coconspirators, a conspiracy drug offense must often be proven by circumstantial evidence. In such situations, circumstantial evidence may consist of a defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements
Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements
HN5 To obtain convictions on charges, of possession of firearms "in furtherance of" a drug trafficking crime the government is obliged to present evidence indicating that a defendant's possession of a firearm furthered, advanced, or helped forward a drug trafficking crime. There are numerous ways that firearms might further drug trafficking crimes, including, among other things, lessening the chance someone might steal the drugs or the profits derived from the drug transactions, and preventing drug transactions from turning sour. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
HN6 In order to show plain error, an appellate court must be able to (1) identify an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Objections
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Jury Instructions

HN7 When a defendant asserts on appeal that a jury instruction was improper and unduly prejudicial, an appellate court must examine whether, taken as a whole, the instruction fairly states the controlling law. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial
Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review
Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums
HN8 As a result of the U.S. Supreme Court's decision in United States v. Booker, a sentencing court cannot engage in judicial factfinding that results in a sentence that exceeds the statutory maximum authorized by the jury verdict alone. However, it is not a Sixth Amendment violation for a sentencing court to make the findings of fact necessary to properly calculate a defendant's advisory guidelines range. More Like This Headnote

COUNSEL: Roy D. Bradley , Madison, Virginia, for Appellant Randolph William Arey; Cheryl V. Higgins , ST. JOHN, BOWLING & LAWRENCE, Charlottesville, Virginia for Appellant Timothy Clay Arey.

John L. Brownlee , United States Attorney, Jean B. Hudson , Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

JUDGES: Before WILKINSON, KING, and DUNCAN, Circuit Judges.

OPINION

PER CURIAM:

Appellants Timothy Clay Arey and Randolph William Arey (collectively, the "Defendants") seek relief from their convictions and sentences in the Western District of Virginia for drug trafficking, conspiracy, and firearms violations. The Defendants raise three primary contentions on appeal. First, they assert that there was insufficient evidence to prove the prosecution's case in two respects: (a) [*2] that the Defendants conspired to possess methamphetamine with intent to distribute, and (b) that they possessed a firearm in furtherance of a drug trafficking crime. Second, they assert that the trial court improperly instructed the jury on the law of conspiracy. Third, they assert that the court violated the Defendants' Sixth Amendment rights by enhancing their guidelines ranges on Count One of the Indictment based on facts not found by the jury. As explained below, we affirm.

I.

On November 17, 2005, a federal grand jury returned a multi-count Superseding Indictment against brothers Timothy and Randolph Arey. Relevant to this appeal, the Indictment charged the Defendants with conspiring to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846 (Count One), charged Timothy with three counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Counts Three, Five, and Six), and charged Randolph with two counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Counts Nine [*3] and Ten). The Defendants pleaded not guilty and were tried by jury in Harrisonburg, Virginia.

During their trial, the Government presented several witnesses who testified to the Defendants' drug trafficking activities. 1 Law enforcement officials testified that agents of

the Bureau of Alcohol, Tobacco and Firearms ("ATF"), along with officers from Augusta County, executed a search warrant on October 7, 2004, at Timothy's home. The agents found Timothy with a loaded pistol in his back pocket, a fanny pack containing methamphetamine, and over $400 in cash. In the house, the agents found $7,000 in cash, digital scales, more methamphetamine, twenty-seven firearms, a quantity of ammunition, and a RF detector. 2

FOOTNOTES

1 The evidence presented at trial is summarized here in the light most favorable to the Government. See United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

2 A RF detector is a device that can determine whether a person is wearing a wire transmitter.

Next, the [*4] Government presented testimony from the Arey brothers' main supplier of methamphetamine. Wayne Roadcap testified that he "fronted" large quantities (pounds) of methamphetamine to Timothy and Randolph from 1996 or 1997 until 2001. 3 The Defendants would then sell the drugs and return cash to Roadcap. Roadcap kept records, which were admitted in evidence, showing the amounts of methamphetamine distributed to each brother, the debts they owed, and when the debts were repaid. John Harold, a drug dealer who had worked with Roadcap, testified that the Arey brothers would individually come to Roadcap's house to pick up drugs. He testified that Roadcap confirmed to him that the Arey brothers were selling drugs for Roadcap.

FOOTNOTES

3 The Arey brothers continued to buy methamphetamine from others after Roadcap was arrested in 2001.

The Government also presented the testimony of several cooperating witnesses who had bought methamphetamine from one or both of the Arey brothers. Louis Goulet testified that he obtained methamphetamine [*5] from Timothy, first by paying cash and later by trading construction tools and two guns for drugs. When Timothy told Goulet that he was "laying low," he recommended that Goulet obtain drugs from his brother Randolph, which Goulet did. Goulet testified that he sold some methamphetamine for the Arey brothers, and that on one occasion Randolph was carrying a pistol when Goulet purchased drugs from him. Randolph explained to Goulet that he had the firearm in case he got stopped by the police. Treena Louk testified that she and her husband bought methamphetamine from the Arey brothers and that she had seen Randolph carrying a firearm on such occasions. Jose Monjes testified that he bought and sold methamphetamine for Timothy. David Taylor testified that he purchased methamphetamine from Timothy. On one occasion, Taylor saw Timothy with a revolver, which he said he kept nearby in case the police showed up.

Kathy Arey, Randolph's ex-wife, testified that Randolph obtained methamphetamine from his brother and from Roadcap. On two occasions, the Arey brothers came to her house to break up larger quantities of methamphetamine for distribution. She also testified that Randolph carried a firearm [*6] with him when Roadcap delivered drugs to the house. Rhonda Arey, Timothy's ex-wife, testified that her husband sold drugs to several people. On one occasion, she saw a device holding a handgun, mounted under the kitchen table, pointed at the front door. Timothy told her the firearm was under the table for use in the event that a business deal went wrong. 4 After their arrests, both brothers admitted to

ATF agents that they had sold methamphetamine. Timothy also admitted that several persons were selling drugs for him.

FOOTNOTES

4 Timothy also threatened to use this device, i.e. the handgun mounted under the kitchen table, on his ex-wife.

Both Defendants testified at trial, and both claimed that they only sold small amounts of methamphetamine to support their personal habits. The Defendants admitted to speaking with AFT agents, but they denied being part of a conspiracy and denied selling large quantities (pounds) of methamphetamine over a six-year period. Both Defendants also admitted to collecting or carrying firearms, [*7] but denied using them as part of a drug trafficking operation.

Prior to the jury deliberations, the trial court instructed the jury on the applicable legal principles. On appeal, the Defendants challenge the instruction relating to the law of conspiracy, but they failed to object to this instruction at trial. The jury convicted both Defendants on all counts, and they were sentenced on June 1, 2006. During their sentencing hearings, the court, over the Defendants' objections, first found that each Arey brother was responsible for handling nine kilograms of methamphetamine over a six-year period. 5 Based on this finding, each brother's base offense level was enhanced from 32 to 36. The court also found that both Defendants had perjured themselves at trial and thus had obstructed justice. Because of this finding, each Arey brother's base offense level was enhanced an additional two levels, for a total base offense level of 38. After calculating the guidelines range and considering the 18 U.S.C. § 3553(a) factors, the court imposed a sentence totaling 535 months for Randolph, which included a sentence of 235 months on Count One. Timothy

was sentenced to a total [*8] of 952 months in prison, which included a sentence of 292 months on Count One.

FOOTNOTES

5 The jury had found that the Count One conspiracy was responsible for at least 500 grams of methamphetamine.

The Defendants have timely appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

First, HN1in evaluating whether a jury verdict is supported by sufficient evidence, we must sustain the verdict, "'if there is substantial evidence, taking the view most favorable to the Government, to support it.'" United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc) (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). Second, HN2we review for plain error an issue raised first on appeal and not properly preserved in the district court. See United States v. Olano, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Third, HN3we review a sentence to determine whether it is within the statutorily prescribed range and if it is reasonable. [*9] See United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006).

III.

The Defendants raise three primary contentions on appeal. 6 First, they assert that there was insufficient evidence for the jury to conclude (a) that they conspired to possess methamphetamine with intent to distribute, and (b) that they possessed firearms in furtherance of a drug trafficking crime.

Second, they assert that the trial court improperly instructed the jury on the law of conspiracy. Third, they assert that the court erred in enhancing their sentences on Count One on the basis of facts not found by the jury. We address these contentions in turn.

FOOTNOTES

6 The Defendants make two other contentions on appeal that we summarily reject based on controlling precedent. First, they assert that they cannot be convicted for more than one violation of 18 U.S.C. § 924(c) arising out of the same predicate drug trafficking crime. This assertion has previously been rejected by us. See United States v. Camps, 32 F.3d 102, 107 (4th Cir. 1994) (concluding that Government can obtain convictions for more than one violation of § 924(c) that arise out of same predicate crime). Second, the Defendants assert that Congress violated the Constitution in its regulation of substances whose use did not affect interstate commerce. This assertion has been heretofore raised before and rejected by the Supreme Court. See Gonzales v. Raich, 545 U.S. 1, 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (concluding that it is valid exercise of Congress's power to regulate, through Controlled Substance Act, local cultivation and use of marijuana).

[*10] A.

1.

The Defendants contend that the verdict on Count One was not supported by sufficient evidence to prove a drug conspiracy because the Government did not establish that a business agreement existed between the brothers relating to the distribution of drugs. 7 HN4To secure a conviction on a charge of conspiracy to possess methamphetamine with

intent to distribute, the Government must first prove that an agreement existed among the alleged co-conspirators to possess and distribute methamphetamine. See United States v. Wilson, 135 F.3d 291, 306 (4th Cir. 1998). Because there is sometimes a lack of direct evidence of an agreement among co-conspirators, a conspiracy drug offense must often be proven by circumstantial evidence. See United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) (en banc). We have recognized that, in such situations, "[c]ircumstantial evidence . . . may consist of a defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy." Id. at 858. (internal quotation marks omitted).

FOOTNOTES

7 On appeal, the Defendants focus on whether there was sufficient evidence to determine if a conspiracy to possess methamphetamine with intent to distribute existed between the two brothers only. They ignore the fact that there was evidence establishing they were involved with other alleged co-conspirators, as charged in Count One of the Indictment.

[*11] Viewing the evidence in this case in the light most favorable to the Government, there is more than ample evidence to establish the Count One conspiracy charge. Indeed, the Government presented overwhelming evidence that the Arey brothers worked together and with others to purchase, package, and sell large quantities of methamphetamine. Both Roadcap and Harold testified that the Arey brothers had purchased illicit drugs from Roadcap and sold those drugs for him. Several other witnesses testified that they bought illicit drugs from the Arey brothers and, on occasion, sold drugs for them. Although there was no formal or written agreement between the alleged co-

conspirators, none was necessary, and the Government presented the jury with more than enough evidence for it to reasonably conclude that each Arey brother was involved in the Count One conspiracy, with others and with each other, to buy and sell methamphetamine.

2.

The Defendants next contend that the jury verdict was not supported by sufficient evidence to prove that they possessed firearms "in furtherance of" a drug trafficking crime, as alleged in Counts Three, Five, Six, Nine, and Ten. HN5To obtain convictions on these charges, [*12] the Government was obliged to "present evidence indicating that [a defendant's] possession of a firearm furthered, advanced, or helped forward a drug trafficking crime." United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002). We have recognized that there are numerous ways that firearms might further drug trafficking crimes, including, inter alia, lessening the chance someone might steal the drugs or the profits derived from the drug transactions, and preventing drug transactions from turning sour. Id.

Viewing the evidence in the light most favorable to the Government, we must readily conclude that sufficient evidence was presented at trial on the "in furtherance of" a drug trafficking crime element of these five counts. The Government presented several witnesses who testified that Randolph and Timothy often carried firearms with them when they were dealing drugs. These witnesses testified that each Arey brother explained that they carried weapons for use in the event their drug deals went wrong, or in case the police showed up. Given this evidence, a reasonable jury was entitled to conclude that the Arey brothers used firearms in furtherance of their drug [*13] trafficking activities.

B.

The Defendants next contend that the court did not properly instruct the jurors on the conspiracy charge alleged in Count One. Specifically, the Defendants assert that the court did not properly advise the jury that the Defendants must have reached an agreement between themselves or with other alleged co-conspirators in order to be convicted of conspiracy to possess methamphetamine with the intent to distribute. Because the Defendants failed to object to the instruction being complained of, we review this contention for plain error.HN6 In order to show plain error, "we must be able to (1) identify an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Ryan-Webster, 353 F.3d 353, 363 (4th Cir. 2003) (internal quotation marks omitted).

HN7When a defendant asserts on appeal that a jury instruction was improper and unduly prejudicial, we must examine "whether, taken as a whole, the instruction fairly states the controlling law." United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990). Here, the court, [*14] after correctly outlining the elements of an unlawful conspiracy to the jury, went into a detailed explanation on the controlling legal principles with regard to the charge in Count One. 8 Because the court fairly advised the jury on the controlling legal principles on the conspiracy issue, there was no error in this regard, and thus our plain error analysis need proceed no further.

FOOTNOTES

8 In relevant part, the court advised the jury on the following legal principles with respect to Count One:

The agreement or understanding need not be an express or formal agreement or be in writing or cover all of the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purposes of the scheme.

. . . But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding and without knowing who all the members are.

. . . .

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from the circumstances and conduct of all the alleged participants. J.A. 612-14. (Citations to "J.A. " refer to the Joint Appendix filed by the parties in this appeal.)

[*15] C.

Lastly, the Defendants contend that their sentences were imposed in violation of the Sixth Amendment, because the court made findings of fact that increased their guidelines ranges on Count One beyond what they would have been on the basis of the jury verdict alone. HN8As a result of the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), a sentencing court cannot engage in judicial factfinding that results in a sentence that exceeds the statutory maximum authorized by the jury verdict alone. However, it is not a Sixth Amendment violation for a sentencing court to make the findings of fact necessary to properly calculate a

defendant's advisory guidelines range. See United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006).

In this case, the sentencing court properly enhanced the Defendants' guidelines ranges on Count One based on its findings that they had committed perjury at trial, and that they were each responsible for handling nine kilograms of methamphetamine over a six-year period. Timothy was then sentenced to 292 months in prison on Count One while Randolph was sentenced to 240 months. Count One [*16] - which charged the Arey brothers with being involved in a conspiracy to distribute 500 grams or more of methamphetamine - carries a statutory sentencing range of ten years to life. See 21 U.S.C. § 841(b)(1)(A). Because the Defendants' sentences were each below the statutory maximum of life in prison, no Sixth Amendment violations occurred here. As a result, this contention of the Defendants must also be rejected.

IV.

Pursuant to the foregoing, we reject each of the Defendants' appellate contentions and affirm their convictions and sentences in the district court. 9

FOOTNOTES

9 We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before us and argument would not aid in the decisional process.

AFFIRMED

**APPENDIX C TO PETITION FOR WRIT OF CERTIORARI**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Filed: April 4, 2007

No. 06-4634
5:05-cr-00029-sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

No. 06-4635
5:05-cr-00062sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

No. 06-4636
5:05-cr-00029-sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

On Petition for Rehearing En Banc

The appellant's petitions for rehearing en banc were submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS SO ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge King, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor

_____
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Filed: April 12, 2007

No. 06-4634
5:05-cr-00029-sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

No. 06-4635
5:05-cr-00062sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

No. 06-4636
5:05-cr-00029-sgw

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

TIMOTHY CLAY AREY
Defendant-Appellant

MANDATE

The Judgment of the Court, entered 3/8/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK